APPEAL NO. 050007
FILED FEBRUARY 15, 2005

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on November 22, 2004. With regard to the only issue before him the hearing officer determined that the appellant's (claimant) impairment rating (IR) was 14% as assessed by the designated doctor whose report was not contrary to the great weight of the other medical evidence.

The claimant appeals, contending that the designated doctor's examination was inadequate and requests the case be remanded. The respondent (carrier) responds that the 14% IR assessed by the designated doctor in an amended report is correct and, if not, the IR should be 11% as assessed by the designated doctor in his original report.

DECISION

Reversed and rendered.

The parties stipulated that the claimant sustained a compensable low back injury on _____; that (Dr. S) was the designated doctor; and that the claimant's maximum medical improvement (MMI) date was May 9, 2001, both statutorily (*see* Section 401.011(30)(B)) and as certified by Dr. S. It is undisputed that the proper version of the AMA Guides is the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association.

After the claimant's compensable injury and a period of conservative care the claimant had spinal surgery in the form of a two-level fusion at L4-5 and L5-S1 on July 14, 1999. The claimant testified that the surgery did not improve his condition. The claimant was apparently in a motor vehicle accident in early 2000. The claimant was subsequently examined by a carrier-required medical examination (RME) doctor who in a report dated May 16, 2000 (and an addendum), assesses MMI on May 16, 2000, with a 22% IR. The RME doctor assesses 10% impairment from Table 49, Section (II)(E), 7% impairment for "decreased lumbar flexion," 5% impairment for decreased right lateral flexion, and 1% for decreased sensation in "an L5 distribution." A record review opined that the RME report contained no documentation to support decreased sensation.

Dr. S was appointed as the designated doctor and on a Report of Medical Evaluation (TWCC-69) and narrative dated October 10, 2001, certified MMI on May 9, 2001, the agreed on statutory MMI date, and assessed an 11% IR based on a 10% impairment from Table 49, Section (II)(E) plus 1% impairment for multiple levels, Section (II)(F). Dr. S invalidated loss of range of motion (ROM) and assessed a 0% impairment for neurologic disorders.

The claimant had a second spinal surgery on June 26, 2002 (neither operative reports of the claimant's first two spinal surgeries are in evidence). Apparently the records of the second spinal surgery were sent to Dr. S with a request for clarification and comment whether those records changed his mind. Dr. S responded by letter dated October 10, 2002, stating:

> Since I am basing this evaluation on the submitted operative report of June 26, 2002, I must make an addendum and revision of the previous impairment rating based on review of this operative note without actual re-evaluation of the patient. Without actually having the patient in front of me, I cannot really comment on his current functional status or range of motion.
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> * * * *
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> At this time, [the claimant] has had two spinal surgeries and has had surgery at three spinal levels, L3/4, L4/5, and L5/S1 including fusion of these segments together. In reviewing the material from Table 49, the patient has 10% impairment for a surgically treated disk lesion with residual symptoms and has two extra percent for multiple operative levels. He also has undergone a second operation which adds an additional two percent to his impairment rating. When seen on October 10, 2001, his range-of-motion measurements were invalid.
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> At this time, based on the surgical procedures performed, his whole-person impairment would be 14% of the whole person.

The treating doctor, in a letter dated April 1, 2003, is of the opinion that in addition to the 14% IR assessed in the same manner as Dr. S did in his amended October 10, 2002, report, the claimant should be assessed as having an additional 15% impairment based on the treating doctors ROM studies and an additional 25% impairment for "weakness of the lower extremities" combined for a total 45% IR. The claimant subsequently had a repeat third surgery on August 4, 2004, which the claimant said had helped him somewhat.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.1(c)(3) (Rule 130.1(c)(3)) provides that the "[a]ssignment of an [IR] for the current compensable injury shall be based on the injured employee's condition as of the MMI date considering the medical record and the certifying examination." That rule has been interpreted to mean that the IR shall be based on the condition as of the MMI date and is not to be based on subsequent changes, including surgery. The preamble of Rule 130.1(c)(3) clarifies that IR assessments "must be based on the injured employee's condition as of the date of MMI." 29 Tex. Reg. 2337 (2004). *See also* Texas Workers' Compensation Commission Appeal No. 040313-s, decided April 5, 2004; Texas Workers' Compensation Commission Appeal No. 040583-s, decided May 3, 2004; and Texas Workers' Compensation Commission Appeal No. 040998-s, decided June 16, 2004. In this case,

Dr. S rated the claimant at statutory MMI as of May 9, 2001, with an 11% IR. Clearly Dr. S's subsequent 14% IR of October 10, 2002, was based on the June 26, 2002, second surgery which was well after the stipulated MMI date of May 9, 2001. With the stipulated May 9, 2001, MMI date there is not another report other than Dr. S's 11% IR which could be adopted. The RME report (aside of other flaws) has a May 16, 2000, MMI date and the treating doctor's report (again, aside other flaws) also considered the second spinal surgery and was assessed years after the MMI date. Section 408.125(c) provides that the designated doctor's report has presumptive weight and the Texas Workers' Compensation Commission (Commission) shall base its determination of IR on the designated doctor's report unless the great weight of the other medical evidence is to the contrary. Rule 130.6(i) provides that the designated doctor's response to a Commission request for clarification is considered to have presumptive weight as it is part of the doctor's opinion, however Dr. S's report of October 10, 2002, can not be considered because in that report he rated conditions which arose after the claimant reached statutory MMI on May 9, 2001.

Accordingly, we reverse the hearing officer's determination that the claimant's IR is 14% and render a new decision that the claimant's IR is 11% as assessed by Dr. S in his initial report and that that report is not contrary to the great weight of the other medical evidence.

The true corporate name of the insurance carrier is **THE CONNECTICUT INDEMNITY COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICES COMPANY
701 BRAZOS, SUITE 1050
AUSTIN, TEXAS 78701.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Margaret L. Turner
Appeals Judge